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No. 88-1771

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOSEPH A. BONJORNO, LORRAINE KERR, and BARBARA K. CLISBY,
Cross-Petitioners,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Cross-Respondents.

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	Page
Counter-Statement Of The Case	1
Reasons For Denying The Cross-Petition	2
A. The Court Of Appeals Correctly Determined That It Had No Power To Deviate From The Postjudgment Interest Rate Mandated By The Federal Postjudgment Interest Statute	2
1. The Court Of Appeals Was Bound By The Terms Of § 1961	2
2. The Cases Cited By Cross-Petitioners Do Not Support Deviation From The Postjudgment Interest Rate Prescribed By Congress	3
3. Section 1961 Applies To This Case And § 1912 Does Not Apply	4
4. The Approach Suggested By Cross-Petitioners Would Encourage Litigation Regarding Postjudgment Interest And Would Frustrate Congress' Intent To Establish Uniformity In Postjudgment Interest Rates	6
5. Kaiser's Appeals Were Meritorious And Not Taken For Purposes Of Delay	7
B. This Court Should Not Disturb The Third Circuit's Refusal To Measure Interest From A Damage Judgment Vacated Due To Plaintiffs' Failure To Prove Damages	8
1. The Ninth Circuit's Decision In Handgards Does Not Support Calculation Of Interest From August 22, 1979	9

Page

2. The Other Cases Relied Upon By Cross-Petitioners Are Inapposite 10

Conclusion 12

TABLE OF AUTHORITIES

CASES: Page

Bailey v. Chattem, Inc., 838 F.2d 149 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988) 11

Botany Worsted Mills v. United States, 278 U.S. 282 (1929) 7

Boyce's Executors v. Grundy, 34 U.S. 275 (1835) . 4

Brock v. Richardson, 812 F.2d 121 (3d Cir. 1987). 3

Copper Liquor, Inc. v. Adolph Coors Co., 701 F.2d 542 (5th Cir. 1983) 11

Davis v. United States, 417 U.S. 333 (1974) 11

Deming v. Carlisle Packing Co., 226 U.S. 102 (1912) 5

E.E.O.C. v. Federal Labor Relations Auth., 476 U.S. 19 (1986) 5

Emaldio v. Pocahontas Steamship Co., 355 F.2d 55 (4th Cir. 1966) 5

Grimes v. Commissioner, 806 F.2d 1451 (9th Cir. 1986) 5

Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985) 9, 10

In re American Pres. Lines, Ltd., 804 F.2d 1307 (D.C. Cir. 1986) 5

Mathis v. Spears, 857 F.2d 749 (Fed. Cir. 1988) .. 11

Mitchell v. Harmony, 54 U.S. 115 (1852) 4

Mt. Hood Stages, Inc. v. The Greyhound Corp., 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980) 10

National Bank of the Commonwealth v. Mechanics' Nat'l. Bank, 94 U.S. 437 (1877) 3

TABLE OF AUTHORITIES – *(Continued)*

CASES:	Page
National R.R. Passenger Corp. v. National Ass'n. R.R.Pass., 414 U.S. 453 (1974)	7
Northern Natural Gas Co. v. Hegler, 818 F.2d 730 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 7 (1988)	11
Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981)	2
Perkins v. Fourniquet, 55 U.S. 328 (1853)	3
Pierce v. United States, 255 U.S. 398 (1921)	3, 7
Total Petroleum, Inc. v. Davis, 822 F.2d 734 (8th Cir. 1987)	11
Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291 (9th Cir.) *cert. denied*, 459 U.S. 1009 (1982)	10
United States v. Michael Schiavone & Sons, Inc., 450 F.2d 875 (1st Cir. 1971)	10
West Wisconsin Railway Co. v. Foley, 94 U.S. 100 (1877)	3
STATUTES:	
28 U.S.C. § 1912	4, 5, 6
28 U.S.C. § 1961	passim
OTHER AUTHORITIES:	
S. Rep. No. 275, 97th Cong., 1st Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21	7
Letter from Alice M. Rivlin, Director Congressional Budget Office to Sen. Thurmond, *reprinted in* 1982 U.S. Code Cong. & Admin. News 42	7

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Cross-Respondents.

Cross-petitioners, Joseph A. Bonjorno, Lorraine Kerr, and Barbara K. Clisby, have raised no questions worthy of this Court's attention. They raise no conflict among the circuits. They raise no unsettled legal issues. On the contrary, the determination of the Court of Appeals concerning the issues raised by cross-petitioners was correct and conformed to the consistent positions on these issues taken by other courts. Cross-petitioners point to no authority in their favor. This Court should deny the Conditional Cross-Petition regardless of the disposition of Petitioner/Cross-Respondent Kaiser's Petition for a Writ of Certiorari.

COUNTER-STATEMENT OF THE CASE

Kaiser hereby incorporates by reference the Statement of the Case contained in its Petition For a Writ of Certiorari, No. 88-1595.

REASONS FOR DENYING THE CROSS-PETITION

A. The Court of Appeals Correctly Determined That It Had No Power To Deviate From The Postjudgment Interest Rate Mandated By The Federal Postjudgment Interest Statute.

Cross-petitioners ask this Court to declare that the Court of Appeals erred in not awarding postjudgment interest at *prime rate,* notwithstanding a federal statute prescribing a rate of postjudgment interest lower than prime rate. The Court of Appeals correctly[1] disposed of cross-respondents' argument. This Court need not review the routine decision of the Court of Appeals to adhere to the terms of a governing federal statute.[2]

1. The Court Of Appeals Was Bound By The Terms Of § 1961.

Cross-petitioners' argument that the Court of Appeals should have exercised its so-called "inherent equitable power" to award interest at *prime rate* in total disregard of the statutory mandate of Congress has no merit. This Court has consistently "emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government." *Northwest Airlines v. Transport Workers Union,* 451 U.S. 77, 95 (1981). Congress prescribed the appropriate rate of postjudgment interest in the prior and amended versions of § 1961 and the Court of Appeals properly held itself bound to apply the law enacted by Congress.

1. The decision of the Court of Appeals was "correct" insofar as it rejected cross-petitioners' argument that it should award prime rates of postjudgment interest. As Kaiser demonstrated in its Petition for Certiorari, No. 88-1595, the Court of Appeals erred in retroactively applying amended § 1961 to a judgment entered prior to its effective date.

2. The text of the Opinion of the Court of Appeals is set forth at length in the Appendix attached to Kaiser's Petition at A-3 through A-28.

This Court in the past has rejected attempts such as this by litigants to obtain interest beyond the amount allowed by statute. In *Pierce v. United States,* 255 U.S. 398, 406 (1921), this Court stated:

> At common law judgments do not bear interest; *interest rests solely upon statutory provision. The only applicable statute of the United States is section 966 of the Revised Statutes (Comp. St. § 1605)* (Citations omitted).[3]

Cf. West Wisconsin Railway Co. v. Foley, 94 U.S. 100 (1877) (Supreme Court rule which provides that damages for delay "shall" be computed at a certain rate sets *mandatory upper limit*).

There is no reason to grant the Cross-Petition to review the Court of Appeals' routine application of the well-established principle that it had no authority to deviate from the terms of a valid federal statute.

2. The Cases Cited By Cross-Petitioners Do Not Support Deviation From The Postjudgment Interest Rate Prescribed By Congress.

The cases relied upon by cross-petitioners to support an award of prime rate postjudgment interest are inapposite.

Three of the cases, *National Bank of the Commonwealth v. Mechanics' Nat'l. Bank,* 94 U.S. 437 (1877), *Perkins v. Fourniquet,* 55 U.S. 328 (1853), and *Brock v. Richardson,* 812 F.2d 121 (3d Cir. 1987), involved claims or equitable decrees to which the federal postjudgment interest statute *did not apply* because they were not "judgments".[4] These cases provide no support

3. Section 966 was the predecessor statute to § 1961.

4. Significantly, in *Mechanics' Nat'l. Bank,* even though the predecessor postjudgment interest statute to § 1961 did not apply, this Court borrowed the specific rate contained in the statute. In *Perkins,* where the postjudgment interest statute did not apply, the Court used a *lower* rate.

for calculation of interest at a higher rate than prescribed in the applicable statute in a situation where either the amended or prior version of the postjudgment interest statute *does* apply.

This Court's decision in *Mitchell v. Harmony,* 54 U.S. 115, 147-49 (1852), also provides no support for cross-petitioners' argument that the Court of Appeals may disregard § 1961. In that case, the Court resolved a conflict between its own Supreme Court Rule 18, a rule promulgated pursuant to Sec. 23 of the Judiciary Act of 1789, and the predecessor postjudgment interest statute to § 1961. The Court decided to apply the *lower* interest rate prescribed by its own rule. The Court did not address any nonstatutory authority to award interest. In addition, it applied a statutorily-authorized *Supreme Court* rule which would not apply to the calculation of interest by any other court. The case provides no support for an argument that the Court of Appeals had authority to deviate from the terms of the then-applicable postjudgment interest statute.

Finally, cross-petitioners inexplicably rely on *Boyce's Executors v. Grundy,* 34 U.S. 275 (1835). That case was decided prior to the enactment of any federal postjudgment interest statute. Moreover, the Court in that case reversed the circuit court's award of interest, finding that *no postjudgment interest was allowable. Boyce's Executors,* like the other cases cross-petitioners rely on, provides no support for an award of prime rate interest here.

3. Section 1961 Applies To This Case And § 1912 Does Not Apply.

Cross-petitioners make the unprecedented argument that 28 U.S.C. § 1961 does not govern the calculation of postjudgment interest by the Court of Appeals.[5]

5. Cross-petitioners raise this argument for the first time before this Court and it should be rejected for this reason alone. *See,*

Instead, they argue that § 1961 only applies to calculations of postjudgment interest *made by the district court.* They posit that 28 U.S.C. § 1912 provides the applicable law for postjudgment interest calculations by the Court of Appeals.

This argument is wholly specious.

First, § 1961 applies to the calculation of postjudgment interest on *all money judgments* "recovered in a district court." Its application does not depend on which court performs the interest calculation.

In addition, § 1912 clearly does not apply here. That section provides that "[w]here a judgment is *affirmed* by the Supreme Court or a Court of Appeals, the court in its discretion may adjudge to *the prevailing party* just damages for his delay, and single or double costs." (Emphasis added). This section only applies where a losing party files a frivolous appeal for the purposes of delay and where the Court of Appeals *affirms* a judgment. *See, e.g., Deming v. Carlisle Packing Co.,* 226 U.S. 102 (1912) (construing predecessor statute); *Grimes v. Commissioner,* 806 F.2d 1451, 1454 (9th Cir. 1986); *In re American Pres. Lines, Ltd.,* 804 F.2d 1307, 1310 (D.C. Cir. 1986); *Emaldio v. Pocahontas Steamship Co.,* 355 F.2d 55, 57 (4th Cir. 1966).

There have been no affirmances by the Court of Appeals here either in the appeals on the merits, or with respect to postjudgment interest. In the merits appeals, the Court of Appeals reversed. In its postjudgment interest decision, it reversed in part and affirmed in part. In addition, cross-petitioners have not argued that Kaiser's appeals or cross-appeals were frivolous or taken solely for delay. According to its explicit terms, therefore, § 1912 does not apply here.

The decision by the Court of Appeals to apply the rate prescribed in § 1961 to calculate postjudgment

e.g., E.E.O.C. v. Federal Labor Relations Auth., 476 U.S. 19, 24 (1986).

interest, rather than to resort to some speculative and variable "equitable" measure of postjudgment interest derived somehow from § 1912, follows an unbroken line of authority. Cross-petitioners cite not one case in support of their argument that § 1912 applies. There is no confusion among the courts which might call for review by this Court. The Conditional Cross-Petition should be denied.

4. **The Approach Suggested By Cross-Petitioners Would Encourage Litigation Regarding Postjudgment Interest And Would Frustrate Congress' Intent To Establish Uniformity In Postjudgment Interest Rates.**

The Court of Appeals properly rejected cross-petitioners' argument that in "exceptional" cases it has the "equitable discretion" to vary the postjudgment interest rate in order adequately to preserve the value of the judgment. Any other result would create confusion and encourage appeals on the issue of postjudgment interest. The postjudgment interest calculation would present to each litigant the opportunity to argue that the case was an "exceptional" one which merited deviation from the general rule.[6] In addition, once it found the case exceptional, the court in each "exceptional" case would be required to determine exactly what rate of interest would adequately preserve the value of the judgment to that particular plaintiff.

The case-by-case approach suggested by cross-petitioners conflicts squarely with Congress' intent to

6. Cross-petitioners do not precisely articulate the reason why a case would be deemed "exceptional" so as to merit deviation from the terms of § 1961. They imply that antitrust cases are in some sense different from "run-of-the-mill" cases. Cross-Petition at 13, 15. However, this argument runs contrary to the explicit language of both prior and amended § 1961, which states without exception that the rate applies to "any money judgment in a civil case recovered in a district court."

establish uniformity in this area. *See, e.g.,* S. Rep. No. 275, 97th Cong., 1st Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21; Letter from Alice M. Rivlin, Director Congressional Budget Office to Sen. Thurmond, *reprinted in* 1982 U.S. Code Cong. & Admin. News 42. To accurately carry out Congress' intent, this Court should adhere to its holding in *Pierce v. United States,* 255 U.S. 398, 406 (1921), that "interest rests solely upon statutory provision." The applicable statute is § 1961, in its prior or amended form, and there is simply no reason to grant the Cross-Petition.[7]

5. **Kaiser's Appeals Were Meritorious And Not Taken For Purposes Of Delay.**

Cross-petitioners contend that the "low" statutory postjudgment interest rates encourage litigants frivolously to "go out of their way to relitigate issues on post-trial motions and on appeals and petitions for certiorari, simply to receive the benefit of the time value of money." Cross-Petition at 21. While they imply that such frivolous litigation occurred in this case, they stop short of making such a contention. Thus, this argument does not apply here and should not be considered.

7. Cross-petitioners attempt to glean some support for their argument from the fact that Congress *rejected* a version of amended § 1961 which set the postjudgment interest rate at prime rate. Cross-Petition at 22. *See* S. Rep. No. 275, 97th Cong., 1st Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 40. Clearly, however, the fact that Congress *rejected* prime rate postjudgment interest does not support an argument that Congress *intended to allow* prime rate postjudgment interest. On the contrary, Congress' intent clearly was *not* to allow prime rate postjudgment for any litigants. *See National R.R. Passenger Corp. v. National Ass'n. R.R. Pass.,* 414 U.S. 453, 458 (1974) ("when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode it includes the negative of any other mode' ") (quoting *Botany Worsted Mills v. United States,* 278 U.S. 282, 289 (1929)).

Even if cross-petitioners had squarely contended that Kaiser had filed frivolous motions, appeals and petitions, the contention would be easily disposed of. The post-trial motions, appeals and petitions for certiorari in this case were not frivolous, were not "relitigated" and were not pursued for purposes of receiving the benefit of the time value of money.

Kaiser repeatedly *prevailed* on its post-trial motions. Moreover, it was *cross-petitioners,* not Kaiser, who initiated *all three of the appeals* in this case.[8] Even with respect to the issues upon which cross-petitioners prevailed, the courts were divided and the victories were not always unanimous. For instance, Circuit Judges Adams and Becker dissented from the denial of rehearing in one of the appeals. In the court below here, Judge Stapleton dissented and three circuit judges voted for rehearing. Justice White dissented from the denial of Kaiser's Petition for a Writ of Certiorari in 1986.

Significantly, the district court below found that Kaiser's appeals and petitions for certiorari "were not frivolous and for the purpose of delay to benefit from the higher commercial market rates of interest during the period the litigation was pending." A-46 through A-47. Cross-petitioners' veiled implication that Kaiser should pay prime rate postjudgment interest as a deterrent to frivolous litigation is directly at odds with the facts of this case.

B. This Court Should Not Disturb The Third Circuit's Refusal To Measure Interest From A Damage Judgment Vacated Due To Plaintiffs' Failure To Prove Damages.

Kaiser agrees with cross-petitioners that this Court should grant certiorari to address whether the Court of Appeals chose the proper date on which to begin the accrual of postjudgment interest. However, this Court

8. In two of the three appeals, Kaiser filed cross-appeals.

need not review the Court of Appeals' decision to reject August 22, 1979 as that date.[9] The August 22, 1979 judgment was vacated when the district court granted Kaiser's motion for a new trial. The court found that plaintiffs offered insufficient evidence to support the jury verdict at the first trial on damages and that the August 22, 1979 damage verdict was the product of confusion and speculation.

Cross-petitioners have not come forward with even one case to support their position that postjudgment interest may run from the date of a damage judgment which is vacated because of the plaintiffs' failure of proof, and which is never reinstated, increased, reduced or even appealed.

1. The Ninth Circuit's Decision In Handgards Does Not Support Calculation Of Interest From August 22, 1979.

Cross-petitioners place primary reliance on *Handgards, Inc. v. Ethicon, Inc.,* 743 F.2d 1282 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985). That case, however, is clearly distinguishable. In *Handgards,* the plaintiff prevailed on liability *and* damages at a first trial. The Court of Appeals reversed, finding a defect in the liability standard utilized by the court, but finding nothing incorrect with respect to the calculation of damages. On remand, the court allowed the jury to reconsider both liability and damages, notwithstanding that the damage verdict was undisturbed by the Court of Appeals. The jury again returned a verdict of liability and damages that exceeded somewhat the damages found in the first trial. The Court of Appeals affirmed the district

9. Cross-petitioners appear to have abandoned their prior position that postjudgment interest should accrue from the date of the unliquidated liability verdict, prior to the date of entry of *any* judgment. The Court of Appeals correctly rejected this argument and cross-petitioners have absolutely no authority for such an argument before this Court.

court's decision to measure postjudgment interest on the second damage judgment from the date of the first judgment.

The court's decision was grounded on *Mt. Hood Stages, Inc. v. The Greyhound Corp.*, 616 F.2d 394, 406 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980), and *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1310 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982). In those cases, appeals were taken on the issue of the statute of limitations and the damages initially determined remained undisturbed. When liability was reaffirmed, the identical damage judgments were restored. In *Handgards*, the court followed this reasoning and found that the first damage judgment and the second damage judgment were essentially identical: both were valid and both included the same elements. Only the standard with respect to liability had been addressed and altered as a result of the appeal. *See Handgards*, 743 F.2d at 1299 ("it can be said that the second judgment 'remains the same – in the same amount, for the same damages incurred during the same period' ") (quoting *Twin City*, 676 F.2d at 1311).

The *Mt. Hood, Twin City* and *Handgards* decisions do not apply in a situation such as this, where the first damage verdict is vacated because it is *defective*. Here, the second judgment can in no way be said to be the "same". Clearly, the measurement of interest may not begin until plaintiff has adequately proven the existence of its damages.

2. **The Other Cases Relied Upon By Cross-Petitioners Are Inapposite.**

Not one of the other cases relied upon by cross-petitioners stands for the proposition that postjudgment interest may begin to accrue prior to the date when the plaintiff adequately proves entitlement to damages and a judgment for damages has been entered. *See United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-77 (1st Cir. 1971) (Court of Appeals reduced

amount of damages by eliminating one element); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (recalculation of attorneys fee award); *Bailey v. Chattem, Inc.*, 838 F.2d 149 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988) (damage award recalculated due to erroneous jury instruction); *Total Petroleum, Inc. v. Davis*, 822 F.2d 734 (8th Cir. 1987) (damage amount modified on appeal); *Mathis v. Spears*, 857 F.2d 749, 760 (Fed. Cir. 1988) (interest awarded from date plaintiff established right to award of some attorneys fees); *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737-38 (10th Cir. 1987) (recalculation of damage figure by Court of Appeals).

This Court need not review the decision of the Court of Appeals which is consistent with all the case law on the subject.[10]

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10. Cross-petitioners argue that the Court of Appeals' decision is inconsistent with prior opinions of the Third Circuit. Even if this were true – which it is not – this does not provide grounds for granting the Cross-Petition. *See Davis v. United States*, 417 U.S. 333, 340 (1974). Moreover, cross-petitioners did not petition for rehearing before the Court of Appeals, which would be the proper device to address an alleged conflict within the circuit.

CONCLUSION

The Conditional Cross-Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,
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